

FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CHARLES H. COLL, DOLORES	§	
McCALL, MARGARET ASCHER,	§	
BEACH PARTNERSHIP, LTD.,	§	
HERIBERTO F. LONGORIA, JR.	§	CIVIL ACTION
MARK BEATTY dba COBRA	§	NO. 2:08-CV-345 (TJW)
PETROLEUM COMPANY, and	§	
DAVID L. KUNDYSEK dba	§	
SOUTHWEST PETROLEUM COMPANY,	§	
Plaintiffs,	§	
	§	MOTION TO DISMISS
	§	
VS	§	
	§	
	§	
ABACO OPERATING, LLC, ET AL.	§	
	§	
Defendants.	§	

DEFENDANT EL PASO MERCHANT ENERGY-PETROLEUM COMPANY
MOTION TO DISMISS FOR IMPROPER VENUE,
SUBJECT TO ITS MOTION TO SEVER

Subject to its motion to sever, and in conjunction with its Motion to Dismiss for Failure to State a Claim and its Motion to Transfer Venue,¹ Defendant El Paso Merchant Energy-Petroleum Company (“EPME-PC”) files this motion to dismiss Plaintiffs’ suit for improper venue, as authorized by Federal Rule of Civil Procedure 12(b)(3), and shows the Court as follows:

A. Introduction

Plaintiffs have sued EPME-PC, along with 116 other defendants in the Eastern District of Texas, Marshall Division. They are asking the Court to certify a class including “royalty owners under oil and gas leases owned and/or operated by Defendants,

¹ Defendant has joined in with other defendants in filing the motions to sever, dismiss for failure to state a claim, and transfer venue.

as well as non-operating working interest owners.” See First Amended Complaint (“FAC”), Docket No. 118, at ¶ 142.

Venue is improper as to EPME-PC in the Eastern District; therefore, the Court should dismiss this suit.

B. Argument

If an action is filed in an improper judicial district, the court may dismiss the action upon timely objection. 28 U.S.C. § 1406(a). The Court should dismiss this case because a substantial portion of Plaintiffs’ claim against EPME-PC, if any, did not occur in the Eastern District of Texas. See 28 U.S.C. § 1391. “In determining whether or not venue is proper, the Court looks to the defendant’s conduct, and where that conduct took place.” *Bigham v. Envirocare of Utah, Inc.*, 123 F.Supp.2d 1046 (S.D. Tex. 2000) (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir.1995)).

EPME-PC was a refining and marketing company with its principle place of business in Houston, Texas. See Affidavit of Jon M. Magnuson, attached as Exhibit A, at ¶ 2. Over the past five years it has no longer been engaged in any material business operations. *Id.* EPME-PC refined and marketed oil and petroleum product in Texas and throughout the United States. *Id.* at ¶ 3. EPME-PC does not produce any oil or gas whatsoever in the Eastern District. *Id.* at ¶ 7. All of EPME-PC’s actions and managerial decisions regarding severance tax refund applications and accounting for the refunds of severance taxes to royalty owners and working interest owners would have occurred at EPME-PC’s offices in Houston. *Id.* No part of EPME-PC’s severance tax refund application and accounting process has occurred in the Eastern District of Texas. *Id.*

For the named Plaintiffs in this suit, EPME-PC has made on royalty or working interest payments. *Id.* at ¶ 6.

As such, venue is not proper in the Eastern District as to EPME-PC.

C. Prayer

Defendant EPME-PC requests that the Court dismiss this claim for improper venue under Rule 12(b)(3), and for such other relief to which it might be entitled.

Respectfully submitted,

By: /s/ D. Mitchell McFarland
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court on February 27, 2009 via its ECF filing system, which will send notification of such filing to all counsel of record who have appeared in this action.

/s/ D. Mitchell McFarland
D. Mitchell McFarland